Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WILLIAM B. STARNES,

Petitioner,

v.

CAPITAL CITIES MEDIA, INC.,
MARILYN VISE, GREG EDWARDS,
and AMIEL CUETO,

Respondents.

Petition for a Writ of Certiorari
to the Appellate Court of Illinois,
Fifth District

PETITION FOR A WRIT OF CERTIORARI

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January 4, 1995

QUESTION PRESENTED FOR REVIEW

Do the Illinois Appellate Court Rules, as applied to this civil case to hold that Petitioner's first three Notices of Appeal, from a trial court judgment, were premature, and that Petitioner's fourth Notice of Appeal was too late violate the due process clause of the 14th Amendment ?

PARTIES TO THE PROCEEDING

The parties to Case No. 93-L-605 in the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois, and to the four appeals to the Appellate Court of Illinois, Fifth District, were Petitioner, William B. Starnes and Respondents Capital Cities Media, Inc., Marilyn Vise, Greg Edwards and Amiel Cueto.

The parties before this Court are the same as the parties below.

Capital Cities Media, Inc. does business in St. Clair County, Illinois under the name of Belleville News-Democrat, a newspaper, and has no parent companies or subsidiaries of which Petitioner is aware to list pursuant to Rule 29.1.

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Fifth District

PETITION FOR A WRIT OF CERTIORARI

William B. Starnes respectfully petitions for a writ of certiorari to review the judgments and orders of the Appellate Court of Illinois, Fifth District, entered in this proceeding on

March 30, 1994 and on July 7, 1994.

OPINIONS BELOW

The March 30, 1994 order of the Appellate Court of Illinois is not reported and is reprinted in the Appendix ("App.") at p. 1a, *infra*.

The July 7, 1994 order of the Appellate Court of Illinois is not reported and is reprinted in the Appendix at p. 12a, *infra*.

The order of the Supreme Court of Illinois denying William Starnes' Petition for Leave to Appeal is reprinted in the Appendix at p. 20a, *infra*.

JURISDICTION

The Appellate Court of Illinois issued its orders with respect to the first three appeals on March 30, 1994,

and its order with respect to the fourth appeal on July 7, 1994. William Starnes filed a Petition for Leave to Appeal on August 11, 1994 which the Supreme Court of Illinois denied on October 6, 1994.

This court has jurisdiction to review the judgments of the Appellate Court of Illinois pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner (plaintiff), a Circuit Court judge for St. Clair County, IL previously filed a Complaint alleging defamation resulting from the publication of two letters from Amiel Cueto to the Illinois Judicial Inquiry Board, containing unfounded claims that William Starnes had engaged in sexual acts in public, had committed the crime of official misconduct, a felony, and had committed acts of fraud, dishonesty and deceit.

On October 21, 1993, the trial court dismissed Plaintiff's Complaint against

all Defendants. On January 5, 1994, the trial court denied Plaintiff's Motion for Reconsideration of its October 21, 1993 Order, and also denied Plaintiff's Motion for Leave to File its First Amended Complaint.

On January 12, 1994, the trial court granted the Motion for Sanctions of Defendant Amiel Cueto, for filing "bad faith" pleadings, and awarded $8,947.50 plus $2,488.22 in favor of Amiel Cueto and against Plaintiff as sanctions under Illinois Supreme Court Rule 137.

On February 4, 1994, the trial court entered an Order imposing sanctions against Plaintiff in favor of Defendants, Capital Cities Media, Inc., Marilyn Vise and Greg Edwards in the sum of $7,395.13, under Illinois Supreme Court Rule 137, for filing "bad faith" pleadings.

In an exercise of caution, Plaintiff filed his initial Notice of Appeal from the October 21, 1993 Order of Dismissal, on November 18, 1993, stating "Plaintiff does not wish to risk filing an untimely Notice of Appeal".

Again, in an exercise of caution, Plaintiff filed his second Notice of Appeal on February 2, 1994, attaching a copy of the first Notice of Appeal, and all trial court orders entered prior to February 2, 1994.

After execution of the final trial court order of February 4, 1994, Plaintiff filed his third Notice of Appeal, and attached the trial court orders of October 21, 1993, January 5, 1994, January 12, 1994 and February 4, 1994, as well as the first two Notices of Appeal.

The first three Notices of Appeal were consolidated by the Court of Appeals into two appeals, Appeal No. 5-93-0769 and Appeal No. 5-94-0066.

On March 30, 1994, the Court of Appeals entered an order finding that all three of the first three Notices of Appeal were premature. The Court of Appeals found that the third Notice of Appeal was premature because the clerk had not "FILED STAMPED" the trial court orders of February 4, 1994 and January 5 and 12, 1994.

Judge Kardis was assigned to this case, at the trial court level, by order of the Illinois Supreme Court, as a special judge, since Judge Kardis normally sits in the Third Judicial Circuit, Madison County, and the case was pending in the Twentieth Judicial

Circuit, St. Clair County.

The trial court order of February 4, 1994 was signed by Judge Kardis on February 4, 1994, at the Madison County courthouse. Madison County adjoins St. Clair County. That order was then hand delivered to the clerk's office in St. Clair County, by the attorney for Plaintiff, and given to the clerk for filing, with instructions that this order be filed before the third Notice of Appeal, which was also handed to the Clerk of St. Clair County at the same time.

Apparently the Clerk of St. Clair County failed to "FILED" stamp the January 5, January 12 and February 4, 1994 orders at the time she placed them in the file. However, the Clerk did "FILED" stamp the February 4, 1994 third

Notice of Appeal to which the trial court orders of January 5, January 12 and February 4, 1994 were attached as exhibits.

Thereafter, before the Appellate Court issued its mandates in the first two appeals, pursuant to an oral and letter request by the attorneys for Capitol Cities Media, Inc., Marilyn Vise and Greg Edwards, the trial court re-entered the orders January 5, January 12 and February 4, 1994 orders on May 3, 1994.

The mandates from the first two appeals were issued by the Court of Appeals on May 31, 1994.

Plaintiff initially failed to appeal from the May 3, 1994 re-orders, believing those orders to be without trial court jurisdiction because the mandates had not

been issued from the first two appeals.

On or about June 12, 1994, Plaintiff filed a fourth Notice of Appeal, and simultaneously filed a motion with the trial court to set aside the trial court re-orders of May 3, 1994 on the grounds the trial court was without jurisdiction to enter those orders because the mandates from the first two appeals had not yet been issued. On June 17, 1994, the attorney for Defendants, Capitol Cities Media, Inc., Marilyn Vise and Greg Edwards wrote Plaintiff's attorney stating those defendants did not object to a trial court order setting aside the May 3, 1994 re-orders, and re-entering the same, in accordance with Plaintiff's motion then pending before the trial court.

On June 22, 1994, Plaintiff filed

his Motion for Leave to Dismiss the fourth Notice of Appeal, without prejudice, with the Court of Appeals, so that Plaintiff could obtain a trial court order, setting aside the trial court re-orders of May 3, 1994, on the grounds they had been entered without jurisdiction, because the mandates had not been issued from the first two appeals.

On July 7, 1994, the Court of Appeals issued its order in the third appeal (arising out of the fourth Notice of Appeal), refusing to dismiss the fourth Notice of Appeal (the third appeal) without prejudice, and holding that the May 3, 1994 orders of the trial court, reissuing all orders which were the subject of the third Notice of Appeal (second appeal), were within the

jurisdiction of the trial court because, although the mandates from the first two appeals had not yet been issued, the first two appeals were "premature, interlocutory appeals". The Court of Appeals ruled that the usual rule that the trial court was without jurisdiction to enter orders before the Court of Appeals issued its mandate, from a prior appeal, did not apply to the case at bar, because the first two appeals were premature, interlocutory appeals.

On August 11, 1994 Petitioner filed his Petition for Leave to Appeal with the Illinois Supreme Court which was denied on October 6, 1994.

In the Petition for Leave to Appeal to the Illinois Supreme Court, Petitioner raised the following single point:

"I. THE APPELLATE COURT ORDER OF JULY 7, 1994 IN APPEAL NO. 5-94-0388, SEPARATELY, AND IN COM-BINATION WITH THE MARCH 30, 1994 APPELLATE COURT ORDER IN APPEAL NOS. 5-94-0066 & 5-93-0769 VIOLATED PLAINTIFF'S RIGHTS OF PROCEDURAL DUE PROCESS UNDER THE 1970 ILLINOIS CONSTI-TUTION, ARTICLE I §2, AND UNDER §1 OF THE 14TH AMEND-MENT TO THE CONSTITUTION OF THE UNITED STATES BY FINDING PLAINTIFF'S FIRST THREE NOTICES OF APPEAL UNTIMELY AS PREMATURE AND PLAINTIFF'S FOURTH NOTICE OF APPEAL UNTIMELY AS TOO LATE; THE ILLINOIS SUPREME COURT RULES AND APPELLATE CASE LAW, AS APPLIED TO THIS CASE, IMPOSED AN UNREASONABLE BURDEN UPON PLAINTIFF WITH RESPECT TO HIS FOUR ATTEMPTS TO FILE A TIMELY NOTICE OF APPEAL; THERE IS NO RATIONAL BASIS FOR THE HYPERTECHNICAL, CHESS-GAME TYPE RULES OF APPELLATE PROCE-DURE THAT WERE APPLIED, IN THIS CASE, TO PLAINTIFF'S FOUR ATTEMPTS TO FILE A TIMELY NOTICE OF APPEAL."

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE PETITION TO CLARIFY DUE PROCESS LIMITS ON THE HYPERTECHNICAL APPLICATION OF RULES APPLICABLE TO THE TIMELINESS OF APPEALS FOR THOSE STATES, LIKE ILLINOIS, WHICH DO NOT FOLLOW THE MODERN RULE THAT A NOTICE OF APPEAL WHICH IS PREMATURE FOR HYPERTECHNICAL REASONS BECOMES TIMELY AT THE TIME THE JUDGMENT IS TECHNICALLY ENTERED.

Petitioner submits that the current Illinois rules, established by the Illinois Supreme Court Rules 272, 303 and 304(a), and the case law interpreting those rules, as applied to the facts of this case, denied Petitioner his right of due process under §1 of the Fourteenth Amendment to the Constitution of the United States in that there was no rational basis for establishing rules applicable to timely Notices of Appeal which are so complex and technical that a party desiring to appeal, and filing four Notices of Appeal, over a period of seven

months, is unsuccessful in having any one of those four Notices of Appeal declared to be timely. The appellate court found the first three Notices of Appeal untimely as premature and the fourth Notice of Appeal untimely as too late.

Due process is flexible and calls for such procedural protections as the particular situation demands. *United States v. $8,850 in United States Currency (1983)*, 461 U.S. 555, 564, 103 S.Ct. 2005, 2012, 76 L.Ed.2d 143, 152.

Generally, the most important criterion in the area of procedural due process is "reasonableness". The state must act reasonably before depriving a person of a liberty or property interest.

Procedural due process requires that a person be given both notice and an opportunity to be heard. *Fuentes v.*

Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991).

Filing a timely Notice of Appeal should not be this difficult.

Most jurisdictions provide that a Notice of Appeal filed after the trial court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry of that order of judgment. In other words, a Notice of Appeal which is considered to be premature, for technical reasons, is considered to be timely, as of the time the order or judgment appealed from is formally entered on the record. By way of example see Rule 4 of the *Federal Rules of Appellate Procedure*, which

provides:

> " **********
> (2) A Notice of Appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry."

Plaintiff does not mean to suggest that the *Federal Rules of Appellate Procedure* apply in this case. Plaintiff does suggest that the Illinois Appellate Rules, and case law interpreting those rules, as applied to the facts of this case, are not reasonable, and that Plaintiff was denied procedural due process under the Fourteenth Amendment to the Constitution of the United States.

Petitioner contends that the actions of the Respondents damaged his reputation and caused him to lose employment opportunities. Loss of employment opportunity

is a liberty entitled to due process protection. *Albright v. Oliver*, 975 F.2d 343, 346 [2,3] (7th Cir. 1992).

CONCLUSION

For the foregoing reason, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 4, 1995

APPENDIX

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NO. 5-93-0769
NO. 5-94-0066

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM B. STARNES, Plaintiff, v. CAPITAL CITIES MEDIA, INC. d/b/a BELLEVILLE NEWS-DEMOCRAT, MARILYN VISE, GREG EDWARDS, AMIEL CUETO, Defendants.	)	Appeal from the Circuit Court of St. Clair County. No. 93-L-605 Filed March 30, 1994

ORDER

This cause coming to be heard on the court's own motion, and the court being advised in the premises, finds:

That on February 25, 1994, plaintiff-appellant, William B. Starnes filed a motion to consolidate appeal Nos. 5-93-0769 and 5-94-0066. Appellant's motion to consolidate calls

into question this court's jurisdiction to review any of the orders appealed;

That the record indicates that on July 7, 1993, appellant filed a 13 count libel and conspiracy to libel complaint against defendants-appellees, Capital Cities Media, Inc. d/b/a Belleville News-Democrat, Marilyn Vise, Greg Edwards (Capital Cities) and Amiel Cueto (Cueto). On August 9 and 11, 1993, defendants filed motions to dismiss on the basis that the allegedly libelous material was absolutely privileged or, in the alternative, that the action was time-barred;

That on October 21, 1993, defendants' motions to dismiss were granted on the basis that statements in judicial pleadings were absolutely privileged. The court dismissed cause No. 93-L-605;

That on October 22, 1993, plaintiff filed a motion to reconsider the order of October 21, 1993;

That on October 25, 1993, plaintiff filed a motion for leave to file a first-amended complaint;

That on November 12, 1993, Cueto filed a motion for attorney fees and costs under Supreme Court Rule 137;

That on November 18, 1993, plaintiff filed a notice of appeal from the order of October 21, 1993 (5-93-0769);

That on January 5, 1994, the trial judge signed an order denying plaintiff's motion for reconsideration and motion for leave to file first-amended complaint;

That on January 12, 1994, Cueto's motion for sanctions under Rule 137 was granted in the amount of $11,475.72;

That on February 1, 1994, Capital Cities filed a motion for attorney fees and costs under Supreme Court Rule 137;

That on February 2, 1994, plaintiff filed a notice of appeal from the orders of October 21, 1993 and January 12, 1994 (5-94-0066);

That on February 4, 1994, the trial judge signed an order granting Capital Cities' motion for sanctions under Rule 137 in the amount of $7,395.13;

That on February 4, 1994, plaintiff filed a third notice of appeal seeking to appeal the orders of October 21, 1993, January 12, 1994 and February 4, 1994. This court acknowledged the February 4 notice of appeal as an amended notice of appeal. Plaintiff now seeks to consolidate all appeals; however, it appears all three notices of appeal have been filed prematurely under Supreme Court Rules 303, 304(a) and 272;

That the first notice of appeal, filed on November 18, 1993, seeks to appeal the dismissal order of October 21, 1993. Supreme Court Rule 303(a) (134 Ill. 2d R. 303(a))

provides that a notice of appeal must be filed in the circuit court within 30 days after the entry of the final judgment appealed from or, if a timely post-trial motion directed against the judgment is filed, within 30 days after entry of the order disposing of the last pending post-trial motion. It is well established that the appeal period does not begin to run until disposition of a timely filed post-trial motion (see Pickle v. Curns (2nd Dist. 1982), 106 Ill. App. 3d 734, 435 N.E.2d 877). Furthermore, defendant-Cueto's timely filed claim for sanctions under Supreme Court Rule 137 was still pending at the time the first notice of appeal was filed. As plaintiff's post-trial motion and Cueto's motion for sanctions remained pending at the time the first notice of appeal was filed, the notice of appeal is premature and fails to vest this court with jurisdiction. Pickle;

Marsh v. Evangelical Covenant Church (1990), 138 Ill.2d 458, 563 N.E.2d 459;

That on February 2, 1994, plaintiff filed a second notice of appeal, seeking to appeal the order of October 21, 1993 and the order of January 12, 1994, awarding Cueto sanctions in the amount of $11,475.72. However, this notice also appears to have been prematurely filed as the order of January 5, 1994 (disposing of the post-trial motion), has never been "entered of record" in accordance with Supreme Court Rule 272. Furthermore, this second notice of appeal fails to vest this court with jurisdiction to review the order of January 12, 1994, as said order fails to contain a finding under Supreme Court Rule 304(a). Supreme Court Rule 272 governs the entry of final judgment for purposes of appeal. Rule 272 provides:

> "If at the time of announcing final judgment the judge requires submission of a form of written judgment to be signed by the judge

> or if a circuit court rule requires the prevailing party to submit a draft order, the clerk shall make a notation to that effect and the judgment becomes final only when the signed judgment is filed. If no such written judgment is to be filed, the judge or clerk shall forthwith make a notation of judgment and enter the judgment of record promptly and the judgment is entered at the time it is entered of record." 137 Ill.2d R. 272.

Under the rule, a written judgment order id final when signed and filed with the clerk of the court. (Granite City Lodge v. Granite City (1990), 141 Ill.2d 122, 565 N.E.2d 929.) Here, the order signed January 5, 1994, denied plaintiff's motion for reconsideration and denied his motion for leave to file and amended complaint. Although the order was signed by the judge on January 5, the signing date is not controlling. It is often stated that a judge's decision in a case must be expressed publicly, in words, and at the situs of the proceeding before it will be considered a rendition of a judgment; an order is deemed

to have become public at the situs of the proceeding when it is filed with the clerk of the court. (Id.) The commonly accepted manner of determining a filing date is by the circuit clerk's file stamp. (People v. Durley (5th Dist. 1990), 203 Ill.App.3d 731, 561 N.E.2d 122; Wilkins v. Dellenback (1st Dist. 1986), 149 Ill.App.3d 549, 500 N.E.2d 692.) As the order of January 5 has never been file stamped, it has not yet been "entered of record" for purposes of Rule 272 and therefore, the order of dismissal is not yet final for purposes of appeal. The February 2, 1994, notice of appeal also seeks to appeal the order of January 12, 1994, awarding Cueto sanctions under Supreme Court Rule 304(a) of "no just reason to delay enforcement or appeal." Such a finding would be necessary because the order signed January 5, 1994, has never been file stamped and entered of record under Rule 272. Even assuming the January 5

order was final and became appealable with the disposition of Cueto's claim for sanctions, the February 2 notice of appeal would be rendered ineffective with the filing of Capital Cities' motion for sanctions on February 1, 1994. See Marsh v. Evangelical Covenant Church (1990), 138 Ill.2d 458, 563 N.E.2d 459;

That plaintiff filed a third notice of appeal on February 4, 1994, seeking to appeal the dismissal order of October 21, 1993, the order of January 12, 1994, and the order of February 4, 1994, awarding defendant-Capital Cities sanctions in the amount of $7,395.13. However, the third notice of appeal also appears prematurely filed as the orders of January 5, 1994, and February 4, 1994, have never been file stamped and "entered of record" in accordance with Supreme Court Rule 272;

That, in sum, all three notices of appeal appear to have been prematurely filed. The first notice of appeal was filed too early because plaintiff's post-trial motion and Cueto's claim for sanctions was still pending at the time this notice of appeal was filed. The second notice of appeal is premature because the order of January 5, 1994, has never been entered of record under Supreme Court Rule 272. Additionally, the order of January 12, 1994, fails to contain a 304(a) finding and absent such finding, said order is not appealable until disposition of all claims and entry of final judgment. The third notice of appeal was filed prematurely as the orders of January 5, 1994, and February 4, 1994 have not yet been entered of record and therefore, are not yet final for purposes of appeal.

IT IS THEREFORE ORDERED that plaintiff-appellant, William B. Starnes, shall be and hereby is, GRANTED 10 days from the date of

this order within which to show cause why the three notices of appeal should not be stricken for lack of jurisdiction under Supreme Court Rules 303, 304(a) and 272.

NO. 5-93-0769
NO. 5-94-0066

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM B. STARNES, Plaintiff,	)	Appeal from the Circuit Court of St. Clair County.
v.	)	No. 93-L-605
CAPITAL CITIES MEDIA, INC. d/b/a BELLEVILLE NEWS-DEMOCRAT, MARILYN VISE, GREG EDWARDS, AMIEL CUETO, Defendants.	)	Filed July 7, 1994

O R D E R

This cause coming to be heard on this court's show-cause order of June 23, 1994, plaintiff's motion for leave to dismiss appeal without prejudice, and the court being advised in the premises, finds:

That on June 13, 1994, plaintiff-appellant, William B. Starnes filed a notice

of appeal from the trial court's order of May 3, 1994. On June 23, 1994, plaintiff was granted seven days to show cause why his appeal should not be dismissed for lack of jurisdiction because the notice of appeal was not filed within 30 days of the judgment appealed (134 Ill.2d R. 303);

That on June 23, 1994, plaintiff filed a motion for leave to dismiss appeal without prejudice. Plaintiff's motion requests this court to conditionally dismiss this appeal with leave to reinstate it. Plaintiff's motion asserts that the circuit court's order of May 3, 1994, is void because it was entered prior to this court's issuance of the mandate in two previous appeals (5-93-0769 and 5-94-0066). Plaintiff further asserts that a motion to vacate on grounds of voidness was filed "simultaneously" with plaintiff's instant notice of appeal and that motion is currently pending before the circuit court.

Plaintiff believes the circuit court can take no action until this court dismisses the instant appeal and issues the mandate in the instant case. According to plaintiff's motion, he intends to have the May 3, 1994 order vacated on voidness grounds and then plans to have the trial court enter another order reiterating the judgment in this case. Plaintiff claims that this future fourth notice of appeal will then properly vest this court with jurisdiction to consider the ordered dismissing his libel complaint and awarding defendants sanctions. This court finds that plaintiff's motion for leave to dismiss appeal without prejudice is not well taken;

That Supreme Court Rule 369 provides:

> "**Dismissal or Affirmance.** When the reviewing court dismisses the appeal or affirms the judgment and the mandate is filed in the circuit court, enforcement

of the judgment may be had and other proceedings may be conducted as if no appeal had been taken.

Remandment. When the reviewing court remands the case for a new trial or hearing and the mandate is filed in the circuit court, the case shall be reinstated therein upon 10 days notice to the adverse party." 134 Ill.2d R. 369 (b) (c).

The mandate is the judgment of the reviewing court transmitted to the lower court. Rule 369 appears to require the filing of the mandate as a condition precedent to further circuit court proceedings subsequent to the dismissal, affirmance or reversal of an appeal. It has been held that if the circuit court enters orders prior to the return of the mandate, such orders are null and void and of no effect. (Bank of Viola v. Nestrick (3rd Dist. 1981), 94 Ill.App.3d 511, 418 N.E.2d

515.) However, it has also been held that this rule has no applicability to premature interlocutory appeals. Callen v. Akhter (1st Dist. 1978), 66 Ill.App.3d 421, 384 N.E.2d 42;

That on March 30, 1994, plaintiff was granted 10 days to show cause why his two previous notices of appeal should not be stricken as premature pursuant to Supreme Court Rules 303, 304(a) and 272. Plaintiff filed no response to the show-cause order and, accordingly, the two previous appeals were dismissed on April 20, 1994. Mandates in those two appeals issued on May 31, 1994. Plaintiff argues that the order of May 3, 1994, is void because it was entered prior to the issuance of this court's mandates on May 31, 1994. Plaintiff appears to rely on the oft-cited rule that a notice of appeal serves to divest the trial court of jurisdiction to enter any further orders of substance in the cause and the jurisdiction of the appellate

court attaches instanter. (Arnold v. Leahy Home Building Co. (2nd Dist. 1981), 95 Ill.App.3d 501, 420 N.E.2d 699.) However, this general rule does not pertain when the notice of appeal is prematurely filed. (King City Federal Savings & Loan Assoc. v. Ison (5th Dist. 1980), 80 Ill.App.3d 900, 400 N.E.2d 562.) The filing of a notice of appeal from an order or judgment which is not made appealable by the Supreme Court Rules governing appeals neither deprives the trial court of jurisdiction to proceed with the case nor vests the appellate court with jurisdiction to consider it. (King City, 80 Ill.App.3d at 902, 400 N.E.2d at 564; Noland v. Steiner (1st Dist. 1991), 213 Ill.App.3d 469, 563 N.E.2d 1166; see also Chand v. Schlimme (1990), 138 Ill.2d 469, 563 N.E.2d 441 (notice of appeal filed prematurely has "no Effect" and therefore cannot deprive trial court of jurisdiction).) As plaintiff's two

previous notices of appeal were prematurely filed, they did not confer jurisdiction on this court nor did they deprive the trial court of jurisdiction to proceed with this case. Consequently, the case remained on the circuit court docket subject to final disposition; as the trial court never lost jurisdiction to begin with the issuance of mandates was not a condition precedent to the continued proceedings in the circuit court. (See Callen, 66 Ill.App.3d at 424, 384 N.E.2d at 45.) Therefore, the trial court had the power to enter the order of May 3, 1994 and said order is not void for lack of subject matter jurisdiction;

That it is well settled that a final and appealable order is one which terminates and disposes of the parties' rights regarding the issues in the suit so that, if affirmed, the trial court has only to proceed with execution of the judgment. (Kinkin v. Marchesi (3rd

Dist. 1991), 213 Ill.App.3d 176, 571 N.E.2d 501.) Here the circuit court's order of May 3, 1994, fully adjudicated the parties' rights; the court reiterated its previous findings and incorporated by reference the ordered previously entered. This court finds that the order of May 3, 1994, is the final and appealable judgment in this cause. As plaintiff's notice of appeal was not filed until June 13, 1994, the notice of appeal is untimely under Supreme Court Rule 303(a).

IT IS THEREFORE ORDERED that this appeal shall be and hereby is, DISMISSED for lack of jurisdiction under Supreme Court Rule 303.

IT IS FURTHER ORDERED that plaintiff's motion for leave to dismiss appeal without prejudice shall be and hereby is, DENIED as said motion is predicated on the basis that the order of May 3, 1994, is not the final judgment in this cause.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK

October 6, 1994

No. 77670 - WIlliam B. Starnes, petitioner. v. Capital CIties Media, Inc., etc., et al., respondents. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1994.